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ABSTRACT

In order to understand the need for affirmative action, legal history should be examined in order to determine if laws passed and practiced throughout history have accomplished their purpose. The legal history of the desegregation of the public schools in America indicates that equality of educational opportunity for all children has been a lie upheld under the "separate but equal doctrine" established by Plessy vs. Ferguson in 1896. Even though many anti discrimination laws are currently on the books and there is a movement towards remedial affirmative action, interracial discrimination and systematic discrimination remain widespread. Furthermore, the consequences of years of discrimination in the past still remain. As long as the consequences of past discrimination persist, the necessity to redress the imbalance continues. (Author/AM)

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AFFIRMATIVE ACTION: PROGRAM INTENT AND HOW IT CAN ASSURE EDUCATIONAL EQUITY FOR THE BLACK STUDENT

by Dr. Thomas White

The term Affirmative Action should be defined as any positive action used as a remedy to relieve past practices of discrimination.

In order to clearly understand the need for Affirmative Action, you must search law history to determine if laws passed and practiced throughout history have truly accomplished their purpose. The legal history of desegregation of public schools reveals a travesty of American democracy and justice which has been perpetuated for centuries. Equality of educational opportunity for all children has been a lie upheld under the "separate but equal doctrine" of Plessy vs Ferguson in 1896.

Today you hear many Whites espousing the need for neighborhood schools. However, the concept of the neighborhood school came to an end with the case of Roberts vs City of Boston. In this case, power was granted to the general school committee to make provisions for "instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon other schools." Because of this ruling, Sarah Roberts and all other Black children were excluded from the schools nearest their homes until 1964, 115 years later.

In 1953, I entered Lincoln University as a freshman. Lincoln was at that time an all Black university enrolling some 3,000 students. Of the 3,000, over 200 were Black high school students who were bussed as far as 125 miles one way to attend the Lincoln University Laboratory High School rather than the high school in their own home town. Even after the passing of

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Brown vs Board of Education in 1954, these Black students continued to be bussed 125 miles each way to school. However, White students began enrolling in Lincoln University almost immediately. That institution currently has a 65% White and 35% Black enrollment. That's 65% White during the day, 100% Black at night since the majority of the White students reside off campus.

The 14th Amendment was passed after the Civil War, and, although no mention of schools or education was made in the amendment, the state was prohibited from any action that would deny to citizens of the United States "equal protection of the laws." The equal protection clause has been the major source on which future litigation has been predicated. The problem here is that the Constitution provides that all men are created equal, however, the term all men did not include Blacks.

The State of Iowa can actually be proud of its record on school segregation. The 1846 Iowa Constitution provided for free schools for all "white persons between the ages of 5 and 21." The statute of 1851 exempted Blacks from taxation for school purposes. A later statute provided for separate schools for Blacks but was struck down by the Iowa Supreme Court. After 1860 there were no more references to exclusion or separation by color in the Iowa Constitution.

The Iowa courts ruled in Clark vs Board of Directors (1868) that the board did not have discretionary power to require colored children to attend a separate school.

In Smith vs Directors of the Independent School District of Keokuk (1875) the court ruled that a pupil cannot be excluded from public schools on account of color, nor can he be forced to attend a separate school.

The 1896 case of Plessy vs Ferguson was the beginning of a number of cases which perpetuated the notion that "separate but equal" facilities satisfy constitutional requirements of the equal protection clause. Cases between 1896 and 1938 case of Gaines Vs Canada, Registrar of the University of Missouri dealt with the power of the state to establish separate schools. Whether these schools were truly equal or not was of secondary significance to the decision of the cases. As an example of this, the Supreme Court said in Cummings vs Richmond County Board of Education "that the vice in the common school system of Georgia was the requirement that the white and colored children of the state be educated in separate schools." Another example is Berea College vs Commonwealth of Kentucky. In this case a fine was imposed on the college for not maintaining separate schools for the races. This case excluded Blacks from attendance at any college or university and brought the rise of Black higher educational institutions, i.e. Fisk, Tuskeegee, Howard, Lincoln, Meharry Medical, Spellman, Tennessee A & I and many, many others.

In Gaines vs Canada, Registrar of the University of Missouri, the Supreme Court held that Missouri must provide educational opportunities for Blacks equal to that of its Whites, and this did not mean availability of services in other states. Phrases such as discrimination in education and a federal right to education were first stated in this case. In this case, the term "equal protection" was extended to mean simultaneous availability of educational opportunity. The simultaneous availability language was struck down in three cases in the mid-1900's. In Sipuel vs the Board of Regent of the University of Oklahoma, an Oklahoma law which denied Blacks admission to the University of Oklahoma Law School was struck down by the Supreme Court since the state had made no arrangements for a law school for Blacks, in the state or out.

In McLaurin vs Oklahoma (1950) McLaurin had been admitted to the University of Oklahoma Graduate College but had been separated from white students. The court concluded that "having been admitted to a state supported school, McLaurin must receive the same treatment as students of ther races." In Sweatt vs Painter (1950) the Supreme Court recognized that it is a non-segregated society in which lawyers engage in their work. Although the Supreme Court justices refused in this case to repudiate the doctrine of separate but equal, they were presented with the argument that no segregated school for Blacks could actually provide equal educational opportunity.

The segregation decision which outlawed racial classifications by public schools in the United States is commonly referred to as Brown vs The Board of Education. Actually, the decision involved four cases which arose in four different states; Kansas, South Carolina, Virginia and Delaware. The United States Supreme Court accepted the separate cases on appeal and then joined them for the 1954 decision. Brown et al vs The Board of Education of Topeka arose under a Kansas statute permitting cities over 15,000 to maintain separate schools for Whites and Blacks in the elementary grades. Linda Brown, a Black pupil living only five blocks from a white school, was required to attend a Black elementary school over 20 blocks from her home. The District Court found that segregation in public education ha· a detrimental effect on Black children but declined to end segregation because the Kansas schools in question were substantially equal in quality. The Supreme Court concluded that "in the field of public education, the doctrine of separate but equal has no place. Separate educational facilities are inherently inequal." Discrimination in the public schools violates the equal protection of the laws guaranteed by the 14th Amendment. Chief Justice Warren pointed out the maljustification for this decision with the words: "To separate them (Black children) from

others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." In Brown II vs The Board of Education of Topeka, the 1955 case, the responsibility for desegregation was to rest with local school officials who were charged to proceed with plans consistent with local administrative problems. Guidelines for the district courts included the instructions that desegregation of public schools must begin "as soon as practicable on a non-discriminatory basis." Additional time could be granted, but the burden was upon the defendant so that they were acting "consistent with good faith compliance" and without unnecessary delay. In general, desegregation was to commence "with all deliberate speed." The "with all deliberate speed" interpretation gave some local school districts an opportunity to avoid the immediate desegregation of schools. In Knoxville, Tennessee, for instance, students were permitted to transfer back to their former schools which resulted in continued segregation of public schools. This situation was resolved in the case of Goss vs The Board of Education in Knoxville, Tennessee. In McNiece al vs The Board of Education of Cahokia, Illinois, the court ruled that a state may not allow a county to close its schools while permitting schools in other counties to remain open, indicating that race is not a constitutional reason for closing schools. Probably the most famous case was Cooper et al Members of the Board of Directors of the Little Rock, Arkansas Independent School District vs Aaron et al (1958). In this case the local board wished to postpone enactment of its desegregation decree because of the threat of violence which has been fostered in part by state officials. All of you who were alive in 1958 will remember that Wallace Faubus dispatched the National Guard to Central High School in Little Rock to oppose integration, not to foster it. The court ordered immediate desegregation and Federal troops were sent to the school to protect Black students from violence. In the case

of Rogers vs Paul (1965) the Supreme Court indicated that desegregation of schools on the basis of a grade a year is too slow in that it denies some children the opportunity to attend an integrated school. The case of Griffin vs The County School Board of Prince Edward County (1964) was a last straw case that turned the tide in desegregation. In an attempt to circumvent integration, public schools in Prince Edward County has been closed while segregated White schools, which were state supported, had taken their place. In this case, Justice Black said "The time for mere deliberate speed has run out."

Under the Civil Rights Act of 1964, the Department of Health, Education and Welfare was empowered to withhold Federal funds from school districts that continued to discriminate against Blacks. H.E.W. promulagted guidelines requiring school districts to make a good faith start toward desegregation. School districts in the South were required to file compliance plans with the United States Office of Education unless they were already under court ordered desegregation plans. The term Affirmative Action was first referred to in the case of Chambers vs Hendersonville City Board of Education. In this 1966 North Carolina case, 16 experienced Black teachers were not reemployed after implementation of desegregation plans while all White teachers were retained and 14 inexperienced new White teachers were hired. The court ruled in this case that there is an affirmative duty on school districts which were segregated to effectuate teacher desegregation, thus the term Affirmative Action was born.

Let's quickly look at some laws or executive orders that have attempted to resolve the problem of desegregation.

With all these laws currently on the books, why all the remedial affirmative action? The purpose of Affirmative Action programs is to eliminate the institutional barriers that minorities and women now encounter in seeking employment, and thereby to redress the historic imbalance favoring white males in the job market. Affirmative Action programs are aimed at, among other things, eliminating the existing discriminatory barriers for equal employment opportunity. Some obstacles that attempt to defer Affirmative Action, or some common examples of discriminatory barriers to equal employment opportunity, are: 1) the employer relies upon word of mouth contact for recruitment--minority persons who have less access than other persons to informal networks of employment information such as through present employees or officials, are denied equal access to available opportunities. 2) Recruitment at schools or colleges with a predominantly nonminority or male makeup is discriminatory when comparable recruitment is not done in predominantly minority or coed institutions. There is a trend these days to recruit the "Black house" or a special support division at the university in order to get more minority students. 3) Rules against employment of married women and rules providing for the automatic termination of employment upon pregnancy amount to one more way to discriminate against women. There is also some difficulty related to job qualifications which are not substantially related to job requirements. These job qulaifications can unfairly penalize minority persons with limited education or job experience. Past history of discriminatory practices continue to deter minority applicants until the employer has clearly demonstrated that equal employment opportunity is being achieved. There has been a growing awareness in recent years of these kinds of problems and widespread adoption of some remedies to deal with them. Despite these remedial efforts, both intentional discrimination and systematic discrimination remain widespread. A point of even

greater significance is that the consequences of years of discrimination in the past still remain. As long as the consequences of past discrimination, that is, employment opportunity, preference in the favoring of white males persists, the necessity to redress the imbalance still continues. These are just some of the considerations which underline the need for remedial affirmative action. The need for remedial affirmative action has been challenged a couple of times. The validity of affirmative action in the form of preferential admission to professional schools for minorities was before the United States Supreme Court in DeFunis vs Odegaard, which involved the program at the University of Washington Law School. However, the high court determined over the dissent of four justices that the case was moot and vacated the judgement of the Washington Supreme Court. The program involved in DeFunis was in some respects similar to the one in the Baake case. In DeFunis as in Baake, a white student who was denied admission claimed that the program violated his right under the 14th Amendment. The trial court ruled in DeFunis' favor but this judgement was reversed by the Washington Supreme Court which found a compelling state interest in integration of the school and the profession. The United States Supreme Court determined that the case was moot because DeFunis had later been admitted to the law school and was about to graduate before the case got to that court. The case that will probably be the most controversial since the Brown vs The Board of Education case is the Allen Baake vs the University of California. Allen Baake is a 37 year old Minnesotan of Norwegian ancestry. A University of Minnesota engineering graduate with a 3.51 grade point average and a Vietnam veteran. Baake was one of 2,644 applicants for 100 places in the 1973 class of the University of California School of Medicine at Davis. Baake has claimed in his case against the University of California that he was denied admission due to a special affirmative action admissions program that would assure certain places for 16 minority students at the University of California, Davis. Baake was rejected

by Davis as he was by 10 other medical schools. Among the 10 were 2 other University of California Medical Schools, which like Davis, were actively seeking to increase the number of minority positions. The one at San Francisco took 22% minority students in the 1973 entering class as opposed to 16% at Davis, and at Los Angeles, the enrollment of minority students was 12% that year. But among the other institutions that turned Baake down were Georgetown, which is 4% minority; Yale, 5% minority; Wayne State, 7% minority; Cincinnati, 8%; and South Dakota, no minority. The problem Baake has is more related to age than race. Baake was born in 1940, so in 1973, he was 10 or 11 years older than the typical medical school freshman, and he would have been in his early 40's before completing his medical training. Medical school alone, not counting the years of speciality training that follow, costs society about $125,000 per graduate. Most medical schools prefer to take those students with the prospect of practicing 40 years over those with a expectancy of less than 30 years. The Baake case has given rise to all kinds of misdealings with preferential treatment. The biggest myth is that the preferential treatment program for minorities made it possible for unqualified Blacks, Chicanos, or Asians to gain admission while qualified White students were rejected. Qualified is defined by Baake supporters as those who scored highest on certain tests and had the highest grade point averages. Even if grades were the sole criteria, Baake was not more qualified than the 16 Chicano, Asian, and Black students admitted under this special program. Baake's grade point average was 3.51 while several other minority students' averages reached to 3.76. Another myth is that if 16 of the 100 slots for freshman medical students had not been set aside for minorities, Baake would have been admitted in 1973 or 1974. The University declares in its brief that even if we assume that all 16 of the spaces reserved under the special admissions program had been open at the time Baake's application was complete, he still would not have been among the 16 selected. According

to the University, there were 15 other White applicants with bench mark scores higher than Baake's and 20 with scores the same as his, and he was not among the 20 likely to have been selected even assuming the selection process had gotten down that far in 1973. In 1974, there were 12 other White applicants whose bench mark scores exceeded his, and some 20 others that were equal to his. Therefore, Baake was at least 32 places from admission and was not even put on the alternates list. It also is not generally known that there were 34 Whites accepted at the medical school who had grade averages lower than Baake's. Let's look for a moment at what's been happening in college admissions for minority graduates since 1956. In 1956, colleges and universities enrolled 4.6 million Whites and 224,000 Blacks. Twenty years later, White enrollment has swollen to 6.3 million and Black enrollment to 748,000. That means White enrollment has increased 36 percent, and Black enrollments have grown by 234 percent. Not only does this indicate that there are more educational opportunities for Blacks, but their success rate of staying in college has also increased proportionately with that of the majority race. More and better academic support systems through special programs and some lessons learned from sheer trial and error have helped to make this possible. Even in the best and most selective schools in the country where adequate funds for special academic support services are usually available, the results have been noteworthy with retention rates for Blacks now nearly as good as those for Whites. For instance, in a study of Black students who since 1969 have studied at highly selective institutions such as Amhearst, Princeton, Harvard, Stanford, Dartmouth, Duke, Oberlin, Yale and Wesleyan, 70 percent have by now successfully graduated, 7 percent remain enrolled, while 23 percent are no longer pursuing a degree. The interesting thing is that these Black college graduates succeeded despite combined scholastic aptitude scores that averaged 200 points below those of White students, most noteably, many of them graduated with honors

through the SAT scores for some fell as much as 300 to 400 points below the college median. Less dramatic progress has been achieved in enlarging representation of minorities among the nation's graduate and professional schools. American medicine is virtually a closed shop being somewhat controlled by the AMA. Still, Black medical enrollments have increased fourfold in the past ten years from 735 to 3,000, now making up about 5 percent of the total. Out of the total 115,538 law students enrolled last year, 9,524, or 8.2 percent, came from minority groups, mostly Blacks. In the medical and legal field, it has been pointed out that traditional criteria of grade point averages and entrance scores are good predictors of the first 1 or 2 years of professional training but does not necessarily predict later professional success. Some of the important elements include persistence, compassion, and social commitment. What is going to be the outcome of the Baake case? It will be interesting. If the Supreme Court rules against Baake, there will probably be a great upheavel of the White majority and the term "BAAKE-LASH" will be coined. If the Supreme Court rules in favor of Baake, the cause of affirmative action in this country will be set back immeasurably. Therefore, it is my opinion that the case will be decided so broadly that either side can interpret it as a victory. This kind of an interpretation should be able to satisfy both sides. What about affirmative action in the state of Iowa? What has it done for Iowa schools? Last year I had an opportunity to serve as consultant for the State Department of Public Instruction to Area Education Agencies to facilitate the development of Title IX Self Studies for school districts within their area. Probably my most interesting experience was landing and getting out of the plane at Creston or Sheldon or Lake Okoboji or Cylinder, Iowa, and greeting the host who undoubtedly had the feeling that the person he was meeting was White. However, the implementation of Title IX in these school districts made it necessary for both small and large school districts to look at themselves critically in

terms of sex discrimination and the inclusion of curriculum that fairly illustrated the attainment of minorities. Although for the Cedar Rapids Community School District the development of the Title IX Self Study was almost overwhelming, its results clearly indicated that we had discriminated against women and some cases men in our district. In small districts, the inclusion of multicultural non-sexist guidelines of the state of Iowa have helped to make communities aware that even though there are not a large number of minorities within the city, it is necessary for the children who live in that community to be aware of the accomplishments of minority peoples. We must consider in educating our young people that we are not educating them just for a particular community; we are educating them in order that they might be able to function in a diverse society.